

<b>JUANA V. RETANA</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,013,806
	)	
<b>U.S.D. 259</b>	)	
Respondent	)	
Self-Insured	)	

Claimant contends she has met her burden of proof to establish she suffered a work-related accident and is entitled to her requested medical benefits and temporary total disability compensation.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

Claimant had worked as a security guard for respondent since 1992. Claimant alleged she injured her low back on October 9, 2003, while trying to break up an altercation between two students. At the January 27, 2004 preliminary hearing, claimant testified she did not immediately seek medical attention. She thought it was just muscle soreness and decided to wait a couple of days. However, when the pain did not go away, claimant sought treatment on her own from Dr. Butler, a chiropractor, whom she saw October 14, 2003.

In addition, because of her persistent symptoms claimant notified respondent of her injury and was referred to the Wichita Clinic. On October 15, 2003, claimant was seen by Nolan M. Beavers, M.D. Dr. Beavers prescribed medications together with physical therapy and suggested claimant followup with her primary care physician.

Dr. Butler's records are not in evidence but when claimant saw Dr. Beavers on October 15, 2003, she reported, "[t]his 34-year-old female comes in today with a complaint of low back pain. She did break up a fight on 10/09/03 at school since that [sic] she has been having increasing low back pain, no neurologic symptoms."<sup>1</sup> There is no medical evidence that controverts claimant's claim of a work-related injury.

Claimant was informed on October 17, 2003, that her workers compensation claim was being denied. Thereafter, claimant sought medical attention from Dr. John Estivo on November 7, 2003. Claimant reported to Dr. Estivo low back pain radiating down into her right leg. Dr. Estivo recommended an MRI of claimant's lumbar spine and physical therapy and gave claimant work restrictions of no lifting over 20 pounds and to limit bending, stooping, and twisting to one-third of her day. He also restricted her to no standing over two hours and then alternate 20 minutes with sitting. He further restricted her from physically restraining any individuals.

The claimant discussed her work restrictions with the respondent's human resources staff, but was told that the respondent could not accommodate her restrictions. Although the claimant was instructed that the occupational nurse would call her, the call from the nurse was never received. The claimant has been off work since November 7, 2003.

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<sup>1</sup> P.H. Trans. Cl. Ex. 3.

At the January 27, 2004 preliminary hearing before the ALJ, two independent witnesses testified to the October 9, 2003 fight. William Villalobos, a 17-year old junior at the school where the incident took place, estimated he was only 20 feet away from the incident and "clearly" saw claimant run over to the fight area and physically move one of the students away from the other boy and put him against a wall.<sup>2</sup>

Laura Larios, the other independent witness testified at the preliminary hearing when asked:

Q. (Mr. Martin) And does Juana, does she come on the scene at the same time that all the other teachers come on to help?

A. (Ms. Larios) No. One of the teachers, I don't know his name, he came. And when they were just like fighting and they were just turning, moving around a lot, he got pushed over. And that's when Juana came. She was struggling, trying to separate them, both of them at the same time. And that's when a lot of just [sic] people just started making noise and a lot of teachers started running.<sup>3</sup>

In addition to the witness testimony presented at the preliminary hearing, the record contains the deposition testimony of eleven additional witnesses. There are almost as many versions of what took place during the altercation as there are witnesses. Although there is some dispute concerning the amount of her physical exertion, none dispute that claimant was present and most acknowledge that she was involved in restoring order.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.<sup>4</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>5</sup>

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.<sup>6</sup> Whether an accident arises out of and in

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<sup>2</sup> P.H. Trans. at 39-41.

<sup>3</sup> *Id.* at 50.

<sup>4</sup> K.S.A. 44-510(a); *See also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>5</sup> K.S.A. 44-508(g); *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>7</sup>

Claimant has a history of low back problems that pre-date the accident alleged in this case. Nevertheless, it is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>8</sup> "The test is not whether the job-related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition."<sup>9</sup>

The Board finds that claimant has met her burden of proof to establish she suffered a work-related accident. Therefore, the ALJ did not exceed her jurisdiction in awarding the requested medical and temporary total disability compensation benefits. Whether or not claimant is also entitled to short-term disability benefits is a matter of contract between claimant and respondent. It is not an issue the Board has jurisdiction to consider.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes, dated February 6, 2004 is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2004.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Robert G. Martin, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>7</sup> *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

<sup>8</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>9</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).